IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1836

COOPERS & LYBRAND,
Petitioner,

v.

CECIL LIVESAY and DOROTHY LIVESAY,
Respondents.

No. 77-1837

PUNTA GORDA ISLES, INC., *et al.*,
Petitioners,

v.

CECIL LIVESAY and DOROTHY LIVESAY,
Respondents.

On Writs of Certiorari to the United States Court of Appeals
for the Eighth Circuit

BRIEF FOR PETITIONER COOPERS & LYBRAND

VERYL L. RIDDLE
THOMAS C. WALSH
JOHN J. HENNELLY, JR.
MICHAEL G. BIGGERS
BRYAN, CAVE, McPHEETERS & McROBERTS
500 North Broadway
St. Louis, Missouri 63102
Attorneys for Petitioner
Coopers & Lybrand

HARRIS J. AMHOWITZ
Of Counsel

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

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OPINIONS BELOW

The opinion and order of the United States District Court for the Eastern District of Missouri are not officially reported but are set forth at pages A-1 to A-3 of the Petition for Writ of Certiorari filed in No. 76-1836 by Petitioner Coopers & Lybrand (hereinafter "Cert. Pet."). The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 550 F.2d 1106 and reproduced at Cert. Pet. pp. A-4 to A-16.

JURISDICTION

The judgment of the Court of Appeals was entered on March 4, 1977. Petitioners' timely petitions for rehearing were denied on March 28, 1977. Separate Petitions for Writs of Certiorari were filed on June 23, 1977, by Coopers & Lybrand (No. 76-1836) and by the other defendants (No. 76-1837) and were granted on November 14, 1977, at which time the cases were consolidated for briefing and argument. 46 U.S.L.W. 3332.[1]

The jurisdiction of this Court is founded on 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Is an order of a district court determining that an action cannot be maintained as a class action appealable pursuant to 28 U.S.C. § 1291 under the "death-knell" doctrine?

2. Did the Court of Appeals exceed the proper scope of its authority in ordering the district court to re-certify this case as a class action?

STATUTES AND RULES INVOLVED

This case involves Sections 1291 and 1292(b) of Title 28, U.S.C., and Rule 23, FED. R. CIV. P., all of which are set forth in their entirety in the Addendum to this brief, *post*.

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[1] On December 5, 1977, the Court granted certiorari in No. 77-560, *Gardner v. Westinghouse Broadcasting Company*, and set that case for oral argument in tandem with the instant matter. 46 U.S.L.W. 3373.

STATEMENT OF THE CASE

The Complaint in this case was filed on July 27, 1973, alleging violations of Sections 11, 12(2) and 17(b) of the Securities Act of 1933 (15 U.S.C. §§ 77k, 77*l*(2) and 77q(a)); Section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. § 78j(b)); and Rule 10b-5 of the Securities and Exchange Commission (17 C.F.R. 240.10b-5). Jurisdiction was invoked under § 22(a) of the 1933 Act (15 U.S.C. § 77v) and § 27 of the 1934 Act (15 U.S.C. § 78aa). Plaintiffs below, respondents here, are Cecil and Dorothy Livesay, husband and wife, who reside in suburban St. Louis, Missouri. Defendants below, petitioners here are, in No. 76-1836, Coopers & Lybrand, a national accounting firm, and, in No. 76-1837, Punta Gorda Isles, Inc., a Florida corporation ("Punta Gorda") and ten individuals who are officers and directors of that company (Apdx. 24-26).

In their Complaint, respondents charged that they had been damaged as the result of allegedly false and misleading statements contained in a registration statement and prospectus issued in connection with a public offering of Punta Gorda debentures and common stock on May 2, 1972 (Apdx. 28-33). Respondents had acquired $5,000 face amount 6% convertible subordinated debentures and 100 shares of common stock in the public offering, which they later sold at a loss of $2,650.00. The complaint, filed on their behalf by a St. Louis lawyer, also contained class action allegations in which respondents purported to represent "all of those persons who purchased the above-described debentures and shares of the common stock of Punta Gorda during the underwriting and public offering thereof which occurred on and following May 2, 1972" (Apdx. 27). Damages were sought in an unspecified amount on behalf of all would-be class members. No equitable relief was prayed for.

Although all of Punta Gorda's officers and directors, as well as its accountants, were named as defendants in the action, none of the members of the underwriting group were joined. The underwriting group was headed by A. G. Edwards & Sons, Inc., of St. Louis and included, among others, the local St. Louis brokerage company of I. M. Simon & Co. (Apdx. 88-91, 157).

Respondents first moved for an order certifying the case as a class action on April 11, 1974, more than nine months after the initiation of the lawsuit, but did not request a hearing at that time (Apdx. 5, 85). Oral argument on the class certification issue was held in the district court in June 1974, at which time it became apparent that a hearing would be required. During the pendency of the class action question, the court, at petitioners' request, had stayed discovery on the merits (Apdx. 6, 86).

On November 1, 1974, respondents filed a Petition for Writ of Mandamus in the Court of Appeals for the Eighth Circuit, asking that the stay on substantive discovery be lifted (Apdx. 9, 103). In their petition, respondents announced that "[r]egardless of whether the Court sustains or denies the class action determination herein [plaintiffs] will at that time commence full and complete discovery of all issues" (Apdx. 106). The Court of Appeals denied the Petition on November 15, stating that:

> "[Plaintiffs] should request a prompt ruling on its [*sic*] motion of April 9, 1974 for an order determining that a class action existed. If an evidentiary hearing is desired, that can likewise be requested. The trial court should then promptly rule on [plaintiffs'] motion and remove its stay order and thereafter permit discovery to proceed on the merits . . ." (Apdx. 107-08).

In the meantime, petitioners had taken the deposition of respondent Cecil Livesay. In response to the question whether he would continue to pursue his individual claim if class action

status were denied, Mr. Livesay said that he was not sure but that he would leave the decision to his attorney and that if his attorney said "yes," he would continue to pursue his individual claim (Apdx. 72-73).

On November 18, 1974, respondents, in accordance with the suggestion of the Eighth Circuit, requested a hearing on the class action question. That hearing was held on December 30. The evidence revealed that respondents' counsel also represented the brokerage firm of I. M. Simon & Co., one of the underwriters in the Punta Gorda public offering. Additionally, respondents' counsel acknowledged that he numbered among his clients several other members of the proposed class of plaintiffs who had sizable claims arising out of that offering:

> ". . . [I]n addition to representing the Livesays, subsequent to the filing of this lawsuit, I have been retained by other individuals to represent them with respect to the losses arising from the public offering, Punta Gorda.
>
> "Those individuals are the following: Mr. and Mrs. Joseph Morrissey, who live in—who are neighbors of mine and have been friends of mine for some twenty-five years. They called me. They sustained a loss of $140,000.00 . . .
>
> "I have been retained to represent a fund in Los Angeles called The Shareholders. . . . They sustained losses in excess of half a million dollars . . . .
>
> "I have been retained to represent a company in Dallas called Regal Capital Company through their lawyer, a Mr. Rosenberg from Dallas. Regal Capital is owned by an individual and he sustained a loss of $18,000.00 . . . .
>
> "I have been retained to represent a Mr. David Kleg and his wife and child, who live in Salt Lake City, and they sustained a loss of—I believe $50,000.00" (Apdx. 151-52).

Respondents' counsel also testified that if class action status were not granted, the local claimants would intervene in this case and "I have specific instructions and suits will be filed" in other jurisdictions on behalf of the nonresident claimants (Apdx. 153).

After receipt of respondents' final brief on the class action certification question on May 26, 1975 (Apdx. 11), the district court entered an order on June 19, 1975, determining that the case could proceed as a class action on behalf of some 1800 purchasers of Punta Gorda securities (Apdx. 168). At the same time, however, the court found that respondents' counsel, in view of his representation of I. M. Simon & Co., had a conflict of interest and ordered him to show cause why he should not be removed as attorney for the class (Apdx. 11, 169-73). Rather than contesting the court's conclusions, counsel withdrew from the case (Apdx 12, 173).

Almost simultaneously, New York counsel appeared on behalf of respondents and was asked by the court to make a determination of the feasibility of joining the underwriters as defendants (Apdx 12, 179). Having received no satisfactory answer,[2] the district judge on October 23, 1975, in response to petitioners' Motion for Reconsideration, or in the Alternative, for Modification (Apdx. 12, 178), tentatively refused to revoke his class certification order but expressed his concern with respondents' adequacy as representatives of the class, saying that "the presence of new counsel does not in itself erase the shadow of inadequate representation previously cast . . . ." (Apdx. 187). (The court did not disband the class at that time for fear of "jeopardiz[ing] potentially valid claims held by absent class members" (Apdx. 188) but ordered a notice sent to the class members advising

[2] Respondents later admitted in an affidavit (Apdx. 15) that they had concluded that the statute of limitations had expired on claims against the underwriters during the period in which the conflict of interest issue had been suppressed.

them, *inter alia*, of the history of the litigation and informing them "that the Court requests petitions for appointment of new class representatives or in the alternative, intervention by class members" (Apdx. 188). That order also directed respondents to conduct discovery to ascertain the names and addresses of the members of the class.

Thereafter, while trying to avoid sending out the notice in the form suggested by the court so as to preserve and solidify their status as class representatives, respondents failed for six more months, until April 1976, to request, even informally, the names of the class members. When they were advised promptly by counsel for Punta Gorda that the information they had requested would not accurately reflect the names of the members of the class (Apdx. 215), respondents again delayed for three more months until July 20, 1976, before initiating the discovery which had been directed by the court almost ten months earlier (Apdx. 200).

Against this backdrop, petitioners, on July 23, 1976, filed a Motion to Decertify the class action on a number of grounds, including, in particular, respondents' inadequacy as class representatives and their delay in pursuing the case. On September 1, 1976, the district court entered an order disestablishing the class action, holding that "[s]ince this lawsuit has been pending for approximately three years, and class action notices have not gone out more than a year after the action was certified as a class action, the Court is forced to the conclusion that there has been a lack of prosecution on the part of the plaintiffs as class representatives" (Cert. Pet., p. A-3). The court thus found it unnecessary to rule on any of the other grounds raised by petitioners in support of their Motion to Decertify.

Respondents did not request the district court to certify its order for immediate appeal under the provisions of 28 U.S.C. §1292(b). They merely filed a notice of appeal and later, in a

separate proceeding, sought a writ of mandamus from the Eighth Circuit. Petitioners filed a motion to dismiss the appeal (Apdx. 210), which was ordered by a panel of the court to be taken with the case. The appeal (No. 76-1881) and the mandamus action (No. 76-1906) were consolidated by the Court of Appeals for briefing and argument. On March 4, 1977, a three-judge panel filed an opinion holding (a) that the decertification order was "final" and appealable under §1291 pursuant to the "death knell" doctrine and (b) that the district court's order revoking the class action designation "is wholly unsupported by the record" (Cert. Pet., pp. A-11, A-15). The Court of Appeals reversed the judgment of the district court and effectively ordered the case to be recertified as a class action. It did not discuss any of the other reasons suggested for decertification in petitioners' Motion to Decertify, nor did it consider whether the other requirements of Rule 23 had been met or whether the action had been properly certified in the first place. Respondents' petition for a writ of mandamus in No. 76-1906 was dismissed as moot. Rehearing by the panel and the court *en banc* was denied on March 28, 1977 (Cert. Pet., p. A-19).

Separate petitions for certiorari were filed on June 23, 1977 by Coopers & Lybrand (No. 76-1836) and by Punta Gorda and the individual defendants (No. 76-1837). Respondents did not cross-petition from the dismissal of their mandamus action. On November 14, 1977, both petitions were granted and the cases consolidated. This brief is being filed on behalf of Coopers & Lybrand, petitioner in No. 76-1836.[3]

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[3] Certain additional facts will be set forth below in the Argument where appropriate.

SUMMARY OF ARGUMENT

I

The initial—and, we submit, dispositive—question raised by the Petitions in this Court is whether the Court of Appeals had jurisdiction to review the district court's order decertifying this case as a class action. Since respondents did not attempt to avail themselves of the certification mechanism contained in 28 U.S.C. §1292(b), the Eighth Circuit's power to hear this case depends solely on the validity of the controversial "death knell" exception to the "final decision" requirement of §1291. We respectfully suggest that the death knell doctrine constitutes an improper judicial revision of the plain language of §1291 and that the Third and Seventh Circuits have therefore correctly rejected the doctrine. *Hackett v. General Host Corporation*, 455 F.2d 618 (3d Cir.), *cert. denied*, 407 U.S. 925 (1972); *Anschul v. Sitmar Cruises, Inc.*, 544 F.2d 1364 (7th Cir.), *cert. denied*, 429 U.S. 907 (1976).

An order cannot be deemed "final" unless discontinuation of the action is the "necessary result" of the order. *Carroll v. United States*, 354 U.S. 394, 405 (1957). The decertification order appealed from here did not operate in any way on respondents' individual claim of $2650. Hence, any discontinuation of this case would not be the "necessary result" of the court's order but, rather, would be the voluntary outgrowth of an economic decision by respondents' lawyer to abandon the case once the "*in terrorem*" prospects of class action recovery or settlement had disappeared. Respondents acknowledged both that their personal claim was not *de minimis* and that they would permit their attorney to make the decision whether to prosecute their individual case if the class action were disallowed. Nevertheless, the Court of Appeals, looking only at the amount of respondents' claim, their net worth, and the prob-

able cost and complexity of the lawsuit, summarily concluded that respondents would abandon the litigation if they were denied the opportunity to represent a class and therefore that the district court's decertification ruling was final and appealable.

The death knell theory has been widely criticized and is neither a proper nor a desirable exception to the finality requirement of § 1291. It flatly ignores the language of Rule 23, which makes class action rulings conditional and provides that they may be altered or amended at any time. The doctrine is discriminatory in that it is available to class action plaintiffs but not to defendants, thus very likely increasing the number of class actions in the federal courts. It also unwisely expands the number of appeals in the federal system and, in the process, requires appellate judges to assume the role of fact-finders on an *ad hoc* basis while failing to provide them with a sufficient record upon which to make the necessary determinations.

The death knell rule effectively creates a separate, protectable substantive right in the attorney for a class-action plaintiff by permitting an appeal of a clearly interlocutory order merely because the attorney considers it economically unfeasible to represent only the named plaintiff. Finally, as reflected by the record in the instant case, the availability of a death knell appeal inspires the maintenance of litigation by plaintiffs who have little personal stake in the outcome of the case.

The death knell doctrine is antithetical to the certainty sought by Congress in enacting § 1291 and to the long-established policy against piecemeal appeals. It engenders chaos and confusion, and its endorsement by this Court would spawn additional pleas for new exceptions to the final judgment rule. There is no good reason why appellate review of class certification denials should not await final judgment like other interlocutory orders, except in those instances where § 1292(b) can be utilized.

The purpose of the death knell rationale was not to endow the named class representative with a special right of immediate appeal but rather to make sure that the refusal to certify does not forever deprive the members of the purported class of the opportunity to challenge that refusal in the appellate courts. Hence, if there ever was a need for the death knell rule, that need has dissipated in the wake of *United Airlines, Inc. v. McDonald*, — U.S. —, 53 L.Ed. 2d 423 (1977). The Court there held that members of the would-be class may intervene after final judgment to appeal an earlier order denying class certification. Hence, even if the named plaintiff chooses to abandon his claim, other putative class members may obtain review of the class action ruling. The very *raison dêtre* of the death knell doctrine has thus been completely undercut by the *United Airlines* decision.

Furthermore, even if the death knell rule were a legitimate concept, the decertification order of the district court in this case was not appealable. Respondents acknowledged that their claim was viable, and the record revealed the existence of several other large claimants who admittedly were ready either to intervene in respondents' case or to institute their own actions.

II

Following its erroneous assumption of jurisdiction, the Court of Appeals summarily swept aside the district court's decertification order by simply substituting its judgment for that of the trial judge on the question of whether respondents had diligently prosecuted the action. The appellate court, on the basis of a cold record, discounted the facts that respondents had originally delayed for nine months in seeking class certification and that they later waited nine additional months before instituting discovery procedures to ascertain the names and addresses of class members. In the process of its usurpation of the district judge's discretion, the Court of Appeals misconstrued the record and

ordered the class to be recertified without any consideration of the other factors raised in petitioners' Motion to Decertify—including the suitability *vel non* of respondents as class champions, which had been repeatedly questioned by the district judge. The Court of Appeals also failed to analyze whether the other requisites of Rule 23 had been met or whether the case should have been designated for class action treatment in the first instance.

Rule 23 commits the supervision of class actions to the continuing sound discretion of the district judge. The Eighth Circuit exceeded the proper scope of its authority in interfering with that discretion, and its ruling is irreconcilable with *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395 (1977).

ARGUMENT

I. The Court of Appeals Did Not Have Jurisdiction of Respondents' Purported Appeal From the District Court's Order Decertifying This Case as a Class Action.

A. Section 1291 Permits Appeals Only From "Final Decisions."

The Court of Appeals entertained respondents' appeal on its merits under 28 U.S.C. § 1291, which reads in pertinent part as follows:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . ."

This Court has said that " 'the final judgment rule is the dominant rule in federal appellate practice.' " *DiBella v. United States*, 369 U.S. 121, 126 (1962). The requirement of finality is of ancient origin and can be traced back in American law to the Judiciary Act of 1789.[4] In fact, its roots are in the English common law, which permitted appeals only from the final disposition of an action. See *Holcombe v. McKusick*, 20 How. (61 U.S.) 552 (1857); *Metcalfe's Case*, 11 Co. Rep. 28a, 77 Eng. Rep. 1193 (K.B. 1615). Just last term, this Court reiterated that "there has been a firm Congressional policy against interlocutory or 'piecemeal' appeals and courts have consistently given effect to that policy. Finality of judgment has been required as a predicate for federal appellate jurisdiction." *Abney v. United States*, — U.S. —, 52 L.Ed. 2d 651, 658 (1977).

The final judgment rule recognizes that the appellate process does not exist as a matter of right and should not be used to

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[4] Sections 21, 22 and 25 of the Act of September 24, 1789, 1 Stat. 73, 83-85.

disrupt an on-going judicial proceeding. *United States v. Nixon*, 418 U.S. 683, 690 (1974); *Parr v. United States*, 351 U.S. 513 (1956). Perhaps Mr. Justice Frankfurter said it best in his oft-quoted opinion for a unanimous Court in *Cobbledick v. United States*, 309 U.S. 323, 325 (1940):

> "Since the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice, Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. Thereby is avoided the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause."

See also *Bachowski v. Usery*, 545 F.2d 363, 373-74 (3d Cir. 1976); Note, *Discretionary Appeals of District Court Interlocutory Orders: A Guided Tour Through Section 1292(b) of the Judicial Code*, 69 YALE L.J. 333, 334 (1959).[5]

While urging a "practical" construction of jurisdictional statutes, the Court has also cautioned that they must be construed "with precision and with fidelity to the terms by which Congress has expressed its wishes." *Palmore v. United States*, 411 U.S. 389, 396 (1973), quoting from *Cheng Fan Kwok v. Immigration & Naturalization Service*, 392 U.S. 206, 212 (1968). Taken literally, the term "final decision" means nothing less than the order which ends the litigation on its merits and leaves nothing to

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[5] Another obvious purpose for the finality requirement is to postpone the appeal on an issue concerning which the trial court might change its mind. *Cinerama, Inc. v. Sweet Music, S.A.*, 482 F.2d 66, 70 (2d Cir. 1973).

be done except to execute the judgment. *Catlin v. United States*, 324 U.S. 229 (1945); *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62 (1948). Long ago, however, it became evident that it is frequently easier to conceptualize about a "final" decision than to recognize one. In 1892, this Court in *McGourkey v. Toledo & Ohio Central Railway Co.*, 146 U.S. 536, 544-45 (1892), observed that "probably no question of equity practice has been the subject of more frequent discussion in this Court than the finality of decrees. . . . The cases, it must be conceded, are not altogether harmonious." More recently, Mr. Justice Powell, speaking for the Court in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974) (*Eisen IV*), said:

> "While the application of § 1291 in most cases is plain enough, determining the finality of a particular judicial order may pose a close question. No verbal formula yet devised can explain prior finality decisions with unerring accuracy or provide an utterly reliable guide for the future."

It is still generally true, however, that a judgment cannot be deemed "final" within the contemplation of §1291 unless it disposes of all parties and all issues. See, *e.g.*, *Wrist-Rocket Mfg. Co. v. Saunders Archery Co.*, 516 F.2d 846 (8th Cir.), *cert. denied*, 423 U.S. 870 (1975); *Kappelman v. Delta Air Lines, Inc.*, 539 F.2d 165 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1061 (1977); *International Controls Corp. v. Vesco*, 535 F.2d 742 (2d Cir. 1976). While the courts have tried, with varying degrees of success, to resist the temptation to bend the final judgment rule to fit a particular case or class of cases, Congress has sought to ameliorate the occasional harshness of literal application of the rule by enacting §1292(b), which permits discretionary interlocutory appeals upon the certification of the district court and the acquiescence of the appellate court. This Court has adopted Rule 54(b), FED. R. CIV. P., in order to facilitate prompt review of judgments which are in fact final as to some parties and/or some issues if the trial court certi-

fies that there is "no just reason for delay" in entering a "final judgment."[6]

In 1949, the Court also recognized an exception to the finality requirement which would permit prompt appellate consideration of a certain "small class" of interlocutory decisions which (a) are separable from and collateral to the issues being contested in the main action, (b) present serious and unsettled legal questions and (c) are too important to be denied review. This "collateral order" doctrine was first articulated in *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541 (1949), and has proven effective as a narrow but flexible exception, as witnessed by its recent invocation in a criminal context in *Abney v. United States, supra*. See generally 15 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE §3911 (1976). The *Cohen* rule was designed to obviate the probability that important collateral orders might finally determine rights which would be irreparably lost by the time of final disposition of the case. *Cohen, supra* at 546. Hence, an order cannot be considered final under *Cohen* if it could be "subject to effective review as part of the final judgment in the action." *Parr v. United States, supra* at 519; *United States v. Ryan*, 402 U.S. 530, 533 (1971).

In all of the semantic struggles fought to confer some measure of precision on the term "final," no class of cases has created more controversy or disharmony than those involving attempted appeals from district court rulings on requests for class action certification under Rule 23. Prior to 1966, orders striking class action allegations were almost universally held

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[6] The district court was not asked by respondents to certify its order under either § 1292(b) or Rule 54(b), and no such certification was made. Nor is § 1292(a)(1), which deals with appeals from grants or denials of injunctive relief, implicated here. Respondents did not seek any injunctive relief in the instant case and have never attempted to justify the jurisdiction of the Court of Appeals under § 1292(a)(1).

not to be appealable under §1291. *See Caceres v. International Air Transport Association*, 422 F.2d 141, 143 (2d Cir. 1970). The 1966 amendments to Rule 23, however, created a new set of "finality" problems and spawned a new appendage to §1291 known as the "death knell" doctrine. That doctrine has suffered through a decade of turmoil and has severely splintered the various Circuits. This Court has never passed on the legitimacy of the death knell rule, and this case presents the appropriate vehicle for such a determination.[7]

B. The Death Knell Doctrine Is Neither a Valid, a Desirable, Nor a Necessary Exception to the Finality Requirement.

1. The death knell doctrine represents an improper interpretation of §1291.

The death knell doctrine was first formulated by the Second Circuit in *Eisen v. Carlisle & Jacquelin*, 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967) (*Eisen I*). The court there noted that the individual plaintiff-class representative had a stake of only $70 in his lawsuit and stated, *l.c.* 120, that "[W]e can safely assume that no lawyer of competence is going to undertake this complex and costly case to recover $70 for Mr. Eisen." The Second Circuit declared that, in refusing to permit the action to proceed as a class action, the district court had "for all practical purposes" terminated the litigation and sounded "the death knell of the action." *Id.*

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[7] In *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973) (*Eisen III*), the Court of Appeals had "retained" jurisdiction under the death knell theory of the order certifying the case as a class action. This Court in *Eisen IV* did not adjudge the propriety of that procedure but ruled instead that the Court of Appeals had jurisdiction under the collateral order doctrine *of the order allocating the cost of class notification.*

at 121. Hence, the court concluded that the order was final and appealable under §1291.[8]

The practical problems inherent in any attempt to apply this new doctrine on an *ad hoc* basis are manifold and soon became manifest. In *Milberg v. Western Pacific Railroad Co.*, 443 F.2d 1301 (2d Cir. 1971), and *Korn v. Franchard Corporation*, 443 F.2d 1301 (2d Cir. 1971), the court was faced with consolidated appeals from two class action denials, one brought by plaintiffs seeking damages for themselves of $8500

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[8] The court in *Eisen I* attempted to justify the new death knell rule as a refinement of the collateral order doctrine of *Cohen*. Such a characterization ignores the fact that *Cohen* applies only to orders which are admittedly not final, whereas the *Eisen* theory is ostensibly based on finality. It has generally been recognized that the death knell doctrine is a concept unto itself, separate and distinguishable from collateral order reasoning. *Share v. Air Properties G. Inc.*, 538 F.2d 279 (9th Cir. 1976), *cert. denied*, 429 U.S. 923 (1976); *Williams v. Mumford*, 511 F.2d 363 (D.C. Cir. 1975); 15 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 3912, p. 511.

Furthermore, it is abundantly clear that the collateral order doctrine does not fit the situation created by a denial of class action certification. *Kramer v. Scientific Control Corporation*, 534 F.2d 1085 (3d Cir. 1976); *Cotten v. Treasure Lake, Inc.*, 518 F.2d 770 (6th Cir.), *cert. denied*, 423 U.S. 930 (1975); *Siebert v. Great Northern Development Co.*, 494 F.2d 510 (5th Cir. 1974). Refusals to certify class actions do not meet *any* of the criteria of the *Cohen* doctrine because (a) they do not "finally" determine any rights collateral to the main action; (b) they do not usually present a "serious and unsettled" legal question which is "too important to be denied review"; and (c) appellate review will not be irreparably lost if it awaits final judgment. *Samuel v. University of Pittsburgh*, 506 F.2d 355, 360-61 (3d Cir. 1974); *Anschul v. Sitmar Cruises, Inc.*, 544 F.2d 1364 (7th Cir.), *cert. denied*, 429 U.S. 907 (1976); *In re Piper Aircraft Distribution System Antitrust Litigation*, 551 F.2d 213, 216-17 (8th Cir. 1977); *see* 15 WRIGHT & MILLER § 3912, p. 511; Comment, *Appealability of Class Action Determinations*, 44 FORDHAM L. REV. 548, 555 (1975). Nor are class certification denials appealable under the narrowly construed and little-used exception of *Gillespie v. United States Steel Corporation*, 379 U.S. 148, 150 (1964), because they are not "fundamental to the further conduct of the case."

and the other by an individual claiming only $386.[9] The majority, while registering doubt as to the wisdom of the doctrine at a time when appellate courts "are now being overwhelmed by an unprecedented number of appeals," nevertheless held that the second judgment was "final" but that the first was not. *Id.* at 1305. Judge Friendly, concurring, voiced reservations whether the death knell doctrine "affords a rule that is truly workable or, indeed, is legally sustainable." *Id.* at 1307. He also suggested that the *en banc* court should "formulate a rule that will avoid the necessity of making such *ad hoc* judgments as have been required in these and other cases and also will afford equality of treatment as between plaintiffs and defendants," and he requested "enlightenment from the Supreme Court." *Ibid.*

Subsequent Second Circuit cases took note of the "rumblings of disapproval in our Court" over the death knell doctrine. *Shayne v. Madison Square Garden Corp.*, 491 F.2d 397, 400 (2d Cir. 1974); *Kohn v. Royall, Koegel & Wells*, 496 F.2d 1094, 1097 (2d Cir. 1974). In *Parkinson v. April Industries, Inc.*, 520 F.2d 650 (2d Cir. 1975), the Second Circuit openly questioned the vitality of its own offspring, and Judge Friendly announced that his misgivings had crystallized to the point that he would abolish the death knell doctrine altogether.[10]

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[9] Technically, *Milberg* involved an order denying class suit designation while *Korn*, like the instant case, was concerned with revocation of an earlier class certification. In analyzing the validity or the application of the death knell doctrine, there is no reason to differentiate between initial refusals to certify and orders decertifying the class.

[10] On several occasions, the Second Circuit eschewed *en banc* reconsideration of the doctrine in anticipation of resolution of the death knell question by this Court in *Eisen IV*. See, *e.g.*, *Shayne v. Madison Square Garden Corp.*, *supra* at 400 n.9; *Kohn v. Royall, Koegel & Wells*, *supra* at 1095 n. 6; and the concurring opinions in *Herbst v. International Telephone & Telegraph Co.*, 495 F.2d 1308, 1317, 1325 (2d Cir. 1974).

In the meantime, the death knell theory was attracting few supporters outside its home Circuit. In *Hackett v. General Host Corporation*, 455 F.2d 618 (3d Cir.), *cert. denied*, 407 U.S. 925 (1972), the Third Circuit flatly rejected the doctrine in a case where the individual plaintiff's personal claim, after trebling, amounted to only $27.00. Judge Gibbons' penetrating majority opinion expressed concern that the death knell theory was unbalanced because it applied only to plaintiffs and not defendants. He also emphasized that the rule operates primarily, if not exclusively, in non-diversity cases in which attorneys are willing to undertake claims on a contingent fee basis, chiefly under the federal antitrust and securities statutes. *Id.* at 623.[11] After weighing the competing values, the court held that in the absence of a § 1292(b) certification or the availability of mandamus, the policy of finality underlying § 1291 should be deemed paramount to any countervailing considerations which might favor immediate review of class certification rulings. The court focused sharply on the inescapable fact that class actions are more often maintained for the benefit of lawyers than clients and that the death knell rule actually creates substantive rights in the plaintiff's attorney:

> "Mrs. Hackett's disinclination to proceed with her lawsuit unless her attorney is allowed to represent many others besides herself does not move us to convert by an *ipse dixit* an order which as to her is clearly interlocutory into a final appealable order. We come down, then, to the question whether . . . we should recognize the attorney deprived of the quixotic opportunity of representing one and one-half million potential claimants . . . as a private attorney general with standing of his own to appeal the adverse class action decision. When all is said and done

[11] The death knell theory is inoperable in diversity jurisdiction class actions inasmuch as the named plaintiffs are required to possess individually viable claims in excess of $10,000 in order to pass the jurisdictional threshold. *Snyder v. Harris*, 394 U.S. 332 (1966).

> this pragmatically is the core issue, though conventional pieties about the role of the legal profession might suggest its obfuscation. *Realistically, when we are asked to grant interlocutory appellate review of an adverse class action determination we are asked to recognize a separate interest of the attorney sufficient to bring the class action determination within the 'collateral order' doctrine, or to recognize the standing of the attorney's client to assert such an interest on his behalf. We decline to do either.*" *Id.* at 625 (Emphasis supplied; footnotes omitted.)[12]

The Seventh Circuit, in *King v. Kansas City Southern Industries, Inc.*, 479 F.2d 1259 (7th Cir. 1973), also squarely disapproved the death knell theory, and that determination was reaffirmed by the Court *en banc* in *Anschul v. Sitmar Cruises, Inc.*, 544 F.2d 1364 (7th Cir.), *cert. denied*, 429 U.S. 907 (1976). In *Anschul*, the court observed, *l.c.* 1366-67, that although the death knell doctrine had been born ten years earlier, "the idea never really has reached maturity." The court identified the widespread discontent with the rule as emanating from its mechanical nature and the fact that it unfairly discriminates against defendants as well as against other plaintiffs who have the financial wherewithal to sponsor litigation on their own behalf.

In evaluating the legitimacy of the death knell doctrine as an interpretation of § 1291, it is especially noteworthy that an order which is pronounced "final" by application of the doctrine does not acquire its "finality" by virtue of any court order but rather by the voluntary decision of the plaintiff—or, more realistically, his lawyer. The decision by the district judge in this

[12] The Third Circuit *en banc* confirmed the rejection of the death knell doctrine in *Katz v. Carte Blanche Corporation*, 496 F.2d 747 (3d Cir. *en banc*), *cert. denied*, 419 U.S. 885 (1974), and held that in the absence of certification or mandamus, review of class action determinations must await final judgment.

case was certainly not a "final" judgment in any sense of the term. It did not operate on respondents' claim in any way. Respondents still have the same individual claim they have always had, which is clearly not *de minimis* and which is viable if they choose to pursue it. The Court of Appeals, however, surmised that respondents' attorney would opt to abandon the case if the *"in terrorem"* prospects of a class action recovery or settlement were withdrawn, and that the ruling of the district court therefore constituted a final judgment. It is a source of mystery how an economic decision by respondents' counsel can confer finality on an order that is palpably interlocutory. In *Carroll v. United States*, 354 U.S. 394, 405 (1957), it was held that an order is not final unless discontinuation of the action is the "necessary result" of the order. The death knell theory cannot be squared with that reasoning.

The death knell doctrine embodies an unwarranted judicial revision of § 1291 and disregards the teaching of this Court that "[a]ppeal rights cannot depend on the facts of a particular case." *Carroll v. United States, supra* at 405. It is also disrespectful of the precept that legislation is the province of Congress, not the courts. Speaking of the finality requirement in *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 181-82 (1955), the Court said:

> "This Court, however, is not authorized to approve or declare judicial modification. It is the responsibility of all courts to see that no unauthorized extension or reduction of jurisdiction, direct or indirect, occurs in the federal system. *Shanferoke Corp. v. Westchester Corp.*, 293 U.S. 449, 451. Any such *ad hoc* decisions disorganize practice by encouraging attempts to secure or oppose appeals with a consequent waste of time and money. The choices fall in the legislative domain."

In light of the foregoing principles, it is scarcely surprising that most courts have either rejected the death knell theory originally conceived in *Eisen I* as an improper interpretation of § 1291 or have so circumscribed its use as to render it virtually nugatory.[13]

2. The death knell doctrine represents an inappropriate and undesirable response to problems created by class action certification rulings.

There are a number of recurring reasons woven throughout the various judicial opinions supporting and explaining the substantial criticism which has been heaped upon the death knell doctrine. We have already adverted to the oft-repeated observation that the doctrine is discriminatory by reason of its availability to plaintiffs but not to defendants.[14] Furthermore, since a ruling adverse to a class action plaintiff is immediately appealable under the doctrine, whereas an order granting class action status is not, it is likely that the doctrine fosters a subtle but pervasive systemic bias in favor of plaintiffs in class action determinations. Any factor which tends to increase the number

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[13] In addition to the cases already discussed, see, *e.g., Lamphere v. Brown University*, 553 F.2d 714 (1st Cir. 1977); *Graci v. United States*, 472 F.2d 124 (5th Cir.), *cert. denied*, 412 U.S. 928 (1973); *Ott v. Speedwriting Publishing Co.*, 518 F.2d 1143 (6th Cir. 1975); *Falk v. Dempsey-Tegeler & Co., Inc.*, 472 F.2d 142 (9th Cir. 1972); *West v. Capitol Federal Savings & Loan Ass'n.*, 558 F.2d 977 (10th Cir. 1977); *Williams v. Mumford*, 511 F.2d 363 (D.C. Cir. 1975).

[14] In an effort to counteract this obvious and frequently criticized deficiency in its original death knell formulation, the Second Circuit has developed a so-called "reverse death knell" procedure for reviewing *grants* of class action certification. *See Eisen III, supra*, 479 F.2d at 1007 n. 1; *Herbst v. International Telephone & Telegraph Co., supra*. That doctrine, too, has given rise to problems in its application, see *Kohn v. Royall, Koegel & Wells, supra*, and *General Motors Corporation v. City of New York*, 501 F.2d 639 (2d Cir. 1974); Comment, *Appealability of Class Action Determinations*, 44 FORDHAM L. REV. 548 (1975). However, considerations of fundamental fairness dictate that any ruling by this Court endorsing the death knell doctrine for plaintiffs should also extend its benefits to defendants. If anything, it would seem more important, more urgent and, in the long run, more economical, to permit early review of *grants* of class action certification than to hear interlocutory appeals from *denials* of class action status.

of class actions in the federal system, particularly for reasons extraneous to the purposes of Rule 23, only serves to heighten the concern repeatedly expressed by this Court for the "danger of vexatious litigation which could result from widely expanded class of plaintiffs under Rule 10b-5." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740 (1975), as quoted in *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 479 (1977).

As noted earlier, the death knell rule defies the maxim capsulized by this Court in *Carroll v. United States*, 354 U.S. 394, 405 (1957): "Appeal rights cannot depend on the facts of a particular case." It also ignores the further lesson of *Carroll, l.c.* 406: "Many interlocutory decisions of a trial court may be of grave importance to a litigant, yet are not amenable to appeal at the time entered, and some are never satisfactorily reviewable." The most fundamental fallacy in the death knell theory, however—and one that is frequently overlooked by the courts—is that it flies directly in the face of the specific language of Rule 23. Rule 23(c)(1) takes cognizance of the need for constant supervision by the trial judge over class actions and expressly provides, with respect to determinations of class action status, that "an order under this subdivision may be conditional, and may be altered or amended before the decision on the merits." One thoughtful commentator has noted that: "An order that is tentative, inconclusive, or subject to future review by the lower court would appear to lack the requisite finality for appeal." Frank, *Requiem for the Final Judgment Rule*, 45 TEXAS L. REV. 292, 315 (1966). By definition, then, an order certifying, decertifying or refusing to certify a class action is subject to amendment by the trial court and, therefore, is not final. *Gerstle v. Continental Airlines, Inc.*, 466 F.2d 1374 (10th Cir. 1972); *Caceres v. International Air Transport Association*, 422 F.2d 141 (2d Cir. 1970).[15]

[15] For the same reason, Rule 54(b) is inapplicable to class action certification rulings. Rule 54(b) may be employed only with respect to an order which is final in its own right and cannot be used to confer finality on an interlocutory order. *Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737 (1976).

Another serious shortcoming in the death knell rationale is that it requires the appellate court to make factual determinations, often on an inadequate record, and to engage in unbridled conjecture concerning the likelihood of the continuation of the action on the part of the individual plaintiff. This is an inefficient utilization of judicial manpower and unnecessarily burdens the already overworked appellate courts.[16] Furthermore, the death knell inquiry has almost always focused exclusively on the *amount* of the named plaintiff's claim, whereas a proper analysis would also include such factors as the probability of success, the feasibility of intervention of other interested parties, the willingness of plaintiff's counsel or other class members to advance the costs of the litigation, and the difficulty of the issues presented. In the overwhelming majority of cases, the record compiled in the district court simply does not address these issues, and the appellate court is relegated to a guess about the named plaintiff's intentions.

Problems of this type, as well as the overriding desire for efficiency in the court system, serve to vindicate the Third Circuit's conclusion that §1292(b) certification is the most appropriate avenue for review of class-action determinations. Section 1292(b) certification is preferable because the district judge, who is already familiar with the record and with the sometimes subtle nuances of the litigation, is in the best position to assess the substantiality of the disputed issues and the economies of immediate review. The legislative history of §1292(b) includes the report of a committee of the Tenth Circuit which summarizes the advantages of certification:

> "Requirement that the trial court certify the case as appropriate serves the double purpose of providing the

[16] Unwillingness to engage in such "rank speculation" has prompted the Fifth Circuit to require the would-be class representative to establish in the district court the nonviability of his individual claim. *See Gosa v. Securities Investment Co.*, 449 F.2d 1330, 1332 (5th Cir. 1971). If the record presented to the Court of Appeals does not contain an affirmative showing of nonviability, the appeal will be dismissed for want of jurisdiction. *Graci v. United States*, 472 F.2d 124 (5th Cir.) *cert. denied*, 412 U.S. 928 (1973).

> appellate court with the best informed opinion that immediate review is of value and at once protects appellate dockets against a flood of petitions in inappropriate cases. It is the opinion of the committee that avoidance of ill-founded applications in the court of appeals for piecemeal review is of particular concern."

1958 *U.S. Code Cong. & Admin. News*, 5262-63 (85th Cong. 2d Sess. 1958); *cf.* Note, *Interlocutory Appeals in the Federal Courts Under 28 U.S.C. §1292(b)*, *88* HARV. L. REV. 607, 633 (1975); Note, 44 FORDHAM L. REV. 433, 437 (1975). Significantly, one of the drafters of the 1966 amendments to Rule 23 has proposed §1292(b) as the most desirable method for the prompt testing of class action rulings. Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments to the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 390 n. 131 (1967); *see also, Report of American Bar Association Special Committee Federal Rules of Procedure*, 38 F.R.D. 95, 104 (1965). And in practice, §1292(b) has been utilized effectively to review denials of class certification in a number of cases. *E.g., Susman v. Lincoln American Corp.*, 561 F.2d 86 (7th Cir. 1977); *Lukenas v. Bryce's Mountain Resort, Inc.*, 538 F.2d 594 (4th Cir. 1976); *Kamm v. California City Development Co.*, 509 F.2d 205 (9th Cir. 1975); *Albertson's, Inc. v. Amalgamated Sugar Co.*, 503 F.2d 459 (10th Cir. 1974); *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969).

Endorsement by this Court of the death knell rubric would inevitably open the door to pleas for even more exceptions to the final judgment rule. The logical extension of the death knell doctrine outside the class action context would permit any plaintiff to appeal from any order if he could convince the appellate court that he would choose to discontinue the litigation if his appeal was not allowed. Bearing in mind that the quest for certainty is the bedrock of the final judgment rule, it is apparent that the death knell doctrine has chipped away

at that foundation and that the many possible corollaries of the doctrine could well cause the substitution of chaos and unpredictability for the certainty sought by Congress.

One of the ironic but inevitable by-products of this flexible approach to finality is that litigants face the undesirable risk that failure to appeal from a particular ruling at the time of its entry will constitute a waiver of the right to appeal at the conclusion of the case. *See Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507 (1950); *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427 (1956). Faced with such a perilous prospect, a prudent lawyer will be forced to appeal many interlocutory orders, including most class certification rulings, thereby disrupting the adjudicatory process, adding costs and unwanted delay, and undermining confidence in the trial court. Frank, *Requiem for the Final Judgment Rule*, 45 TEXAS L. REV. 292, 317 (1966). Proponents of the death knell doctrine appear oblivious or insensitive to its ramifications upon the dockets of our appellate courts and to the warning of this Court that the final judgment rule and exceptions thereto must be approached "somewhat gingerly lest a floodgate be opened that brings into the exception many pretrial orders." *Switzerland Cheese Ass'n. v. E. Horne's Market, Inc.*, 385 U.S. 23, 24 (1966).[17]

The mere existence of the death knell doctrine has still another pernicious effect which is vividly depicted by the record in this case. By permitting appeals in cases instituted by plaintiffs with insignificant amounts at risk, the doctrine encourages litigation by those who have the least at stake. The record here reveals that respondents' original counsel also represented two of his own neighbors, Mr. and Mrs. Joseph Morrissey, whom

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[17] More than 19,000 appeals were filed in the federal system in the fiscal year ending in June 1977, almost three times as many as in 1966 when *Eisen I* was decided. *1977 Annual Report of the Director, Administrative Office of the United States Courts*, Table I, p. 65a.

he described as "millionaires" and "friends of mine for some 25 years," and who had allegedly suffered a loss of $140,000 in the Punta Gorda transaction (Apdx. 151-52). The same attorney further acknowledged that he had also been retained by (a) a Fund with a claim for more than $500,000, (b) an individual and his wife who had allegedly lost $50,000, and (c) another company which claimed damages in the approximate amount of $18,000 (Apdx. 152).[18] Yet this lawsuit was instituted only on behalf of respondents, whose alleged losses totalled $2650, and whose resources are modest, while none of the major claimants made any attempt to intervene. It is certainly permissible to infer that this entire action was structured for the purpose of taking advantage of the death knell theory. Such tactics should neither be encouraged nor rewarded.

Even if it be assumed that respondents would choose to abandon their individual claim in the absence of a death knell appeal, there is an important policy question which should attend that choice. This Court must consider whether the federal judicial system should subject itself to the burdensome cost of interlocutory appeals merely to accommodate claimants whose stake in the proceedings is such that they would choose not to walk at all if forced to walk alone. If indeed respondents and their counsel think so little of their claim as to forsake it, then the sentiments espoused in *Hackett* may well dictate that their own appraisal of their claim should be accepted by the courts:

> "Our scarce judicial resources cannot be allocated on the assumption that they must provide a forum for the vindication of every individual wrong however slight. . . . If in some cases . . . the individual claim often will be so small that neither private nor public lawyers think it

[18] Respondents' original counsel stated that these clients had instructed him either to intervene in this case or to file individual suits on their behalf if this case were not allowed to proceed on a class basis (Apdx. 153).

> should be litigated, then that decision of the legal market place may be the best reflection of a public consciousness that the time of the lawyers and of the court should best be spent elsewhere." 455 F.2d at 626.

3. The death knell doctrine is unnecessary as a result of *United Airlines, Inc. v. McDonald*, — U.S. —, 53 L.Ed. 2d 423 (1977).

In addition to all the foregoing factors militating against the adoption of the death knell theory, this Court's decision last term in *United Airlines, Inc. v. McDonald*, — U.S. —, 53 L. Ed. 2d 423 (1977), renders the doctrine completely unnecessary and superfluous. *United Airlines* arose out of an action by a former stewardess named Romasanta challenging United's "no marriage" rule as discriminatory against females. A few months after the action began, the district court dismissed the class action allegations but permitted intervention by twelve married stewardesses who had previously protested United's policy. The Court of Appeals refused to entertain an appeal from the order denying class certification. Several years later, the parties to the action agreed to settle their differences and, pursuant to that agreement, the trial court entered a judgment of dismissal. At that time, upon learning of the named plaintiffs' decision not to appeal the earlier adverse class action ruling, former stewardess McDonald, who was a member of the original putative class, filed a motion to intervene and a notice of appeal of the class action order.

The district court dismissed the application as untimely, but the Seventh Circuit reversed and held both that the application was seasonable and that the denial of class action certification some three years earlier was erroneous. This Court, reviewing only the intervention question, affirmed, noting that the refusal to certify could have been appealed "after final judg-

ment" by the named plaintiffs and that since they were disinclined to appeal, McDonald could intervene to prosecute the appeal.[19]

United Airlines has rendered the death knell doctrine obsolete. If respondents should litigate their claim to a conclusion, the class action denial can be tested at that time either by respondents or by other putative class members upon timely motion to intervene. Conversely, if respondents and their counsel deem their claim to be unworthy of pursuit and dismiss their case, other members of the would-be class could then intervene under the rationale of *United Airlines* to challenge the propriety of the district court's decertification order.[20] Inasmuch as the purpose of the death knell theory is *not* to facilitate an immediate review of class action rulings but "to make certain that the refusal to certify does not deprive the members of the purported class of an opportunity for review in due course of the refusal on appeal," *Hooley v. Red Carpet Corporation*, 549 F.2d 643, 645 (9th Cir. 1977), the *United Airlines* decision strips the death knell doctrine of its asserted purpose and permits the graceful early retirement of a well-intentioned idea which is unfounded in law or logic and unworkable in practice.

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The death knell doctrine was conceived in the conviction that the class action was a salutary and efficient utensil for redressing wide-scale wrongdoing. But since the initial surge of exuberance which accompanied promulgation of new Rule 23 a

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[19] Implicit in this holding is the determination that the judgment did not become final and appealable until the entry of the district court's order of dismissal following the settlement.

[20] There is also authority for the proposition that the named class representative himself may convert an adverse interlocutory class certification order into an appealable final judgment if he voluntarily dismisses his individual action under Rule 41(a). *See United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958); *Thomsen v. Cayser*, 243 U.S. 66 (1917).

decade ago, there has been an ever-growing school of thought that the class action device itself is susceptible to more abuses than the conduct it was designed to cure. Four years ago, in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 555 (1974), the Court characterized the criticisms of Rule 23 as both "numerous and trenchant."[21] Although class actions "have sprouted and multiplied like the leaves of the green bay tree," *Eisen III*, *supra*, 479 F.2d at 1018, it is well documented that they are rarely, if ever, tried and that they serve as a formidable weapon to extract exorbitant settlements from defendants who cannot afford to run the risk of even a frivolous suit or to pay the defense costs connected therewith.[22] Even though a claim is completely without merit, the specter of class action recovery, no matter how remote, frequently induces businessmen and insurance companies to knuckle under to extortionate settlement demands rather than to risk a catastrophic judgment. *Herbst v. International Telephone & Telegraph Corp.*, *supra*, 495 F.2d at 1313.[23]

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[21] Among the more insidious effects of Rule 23 has been the tendency of some courts to dispense with proof of certain elements of a cause of action on an individual basis in order to achieve manageability. For example, there is some authority that class members need not prove individual reliance in § 10b cases. *Blackie v. Barrack*, 524 F.2d 891 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976). Such rulings—and indeed the death knell doctrine itself—are violative of the mandate of the Rules Enabling Act, 28 U.S.C. § 2072:

> "Such rules shall not abridge, enlarge or modify any substantive right . . ."

[22] *See Report and Recommendations of the Special Committee of the American College of Trial Lawyers on Rule 23*, pp. 15-17 (1972); Handler, *Twenty-Third Annual Antitrust Review*, 71 COLUM L. REV. 1, 9 (1971).

[23] Judge Medina, in *Eisen III*, *supra*, at 1019, observed that class actions have been branded as "legalized blackmail," and commented that the expenses involved in such a lawsuit "have brought such pressure on defendants as to induce settlements in large amounts as the alternative to complete ruin and disaster, irrespective of the merits

The Third Circuit in *Hackett* correctly perceived that the fight over the death knell doctrine, which has now finally reached this Court, is a lawyers' fight rather than a clients' fight. In the instant case, the original certification of the class precipitated the emergence of New York counsel who specialize in this type of litigation. A ready-made class action, with its enticing prospect of huge attorneys' fees, naturally attracts the lawyers' attention, but the fact remains that respondents themselves stand to recover no more than $2650 in damages whether the case takes two days or two months to try. If respondents actually would have abandoned their claim after the class was disbanded, that decision admittedly would have been that of their lawyer (Apdx. 72-73). If respondents would walk away from their lawsuit because their attorney finds it economically undesirable to represent only them, then we, like the Third Circuit in *Hackett*, question whether the federal system should have been burdened with the case in the first place. We also are curious why Mr. Morrissey and the other large claimants have stayed on the sidelines and permitted respondents to carry the ball for them, and we suggest that the reason is very likely found in the death knell theory itself.

The death knell doctrine has not worked, will not work and, especially since *United Airlines*, is not needed. This case highlights the abuses which it encourages. An appeal is a matter of legislative grace, not of right, and Congress has specifically and necessarily restricted the business of the appellate courts. The death knell theory is a judicially-created exception to § 1291 and, as such, is incompatible with the letter and the spirit of *Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737, 746

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of the claim." Judge Duniway, concurring in *Kline v. Coldwell, Banker & Co.*, 508 F.2d 226, 238 (9th Cir. 1974), put it this way:

> "I doubt that plaintiffs' counsel expect the immense and unmanageable case that they seek to create to be tried. What they seek to create will become (whether they intend this result or not) an overwhelmingly costly and potent engine for the compulsion of settlements, whether just or unjust."

(1976), where the Court rejected pleas for expansive readings of § 1291, saying that to accept such an invitation would be to "twist the fabric of the statute more than it will bear":

> "We believe that Congress, in enacting present §§ 1291 and 1292 of Title 28, has been well aware of the dangers of an overly rigid insistence upon a 'final decision' for appeal in every case, and has in those sections made ample provision for appeal of orders which are not 'final' so as to alleviate any possible hardship."

Interlocutory review of class action rulings should be undertaken only pursuant to the provisions of § 1292(b), where applicable, with the All Writs Act available for use in particularly egregious cases.

C. Even if the Death Knell Theory Is Appropriate in Some Instances, the District Court's Decertification Order in This Case Was Not Appealable.

The shortcomings of the death knell theory and the difficulties inherent in its application are pointedly illustrated by the Eighth Circuit's misuse of the doctrine in the instant case. The named plaintiffs' claim of $2650 is neither obviously viable nor patently insubstantial. Thus, as frequently happens in death-knell situations, the Court of Appeals was required to speculate on the issue of viability on an inadequate record.[24] In its un-

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[24] A plaintiff seeking to appeal under the death knell rule must bear the burden of developing a factual record in the district court showing that the death knell has indeed rung. *Share v. Air Properties G. Inc.*, 538 F.2d 279, 282 (9th Cir.), *cert. denied*, 429 U.S. 923 (1976); *Jelfo v. Hickok Manufacturing Co.*, 531 F.2d 680 (2d Cir. 1976); *Ott v. Speedwriting Publishing Co.*, 518 F.2d 1143, 1148-49 (6th Cir. 1975); *Graci v. United States*, 472 F.2d 124, 126 (5th Cir.), *cert. denied*, 412 U.S. 928 (1973); *Gosa v. Securities Investment Co.*, 449 F.2d 1330, 1332 (5th Cir. 1971). "[C]ourts must be strict in making the plaintiff demonstrate that the order complained of truly means the death of his action." *Share v. Air Properties G. Inc., supra* at 282.

accustomed and inappropriate role as fact finder, the court ignored the only evidence appearing in the record on this issue —evidence which indicated that respondents themselves considered their claim to be individually viable and worthy of prosecution. In his deposition, respondent Cecil Livesay was specifically asked: "If the Judge were to decide that this case wasn't proper for a class action, would you proceed with it on your own?" His counsel objected to that question as "speculative," and respondent answered subject to that objection:

> "A. I guess—I couldn't give a yes or no. I would have to consult [my lawyer] and ask him his advice on your question. And if he said yes, then I would proceed, yes" (Apdx. 72-73).[25]

Furthermore, respondents, in an earlier petition for a writ of mandamus to the Eighth Circuit (before the initial class certification), represented that "regardless of whether the Court sustains or denies the class action determination herein, [plaintiffs] will at that time commence full and complete discovery on all issues" (Apdx. 106). Consistent with that assurance, respondents did in fact undertake extensive discovery on their individual claims after the district court revoked class certification (Apdx. 16).[26] Respondents have expressly conceded the viability of their claim and have avowed their devotion to

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[25] Since the decision is that of the attorney rather than the client, it is not improbable that the judgment whether to proceed will be influenced, if not controlled, by the availability *vel non* of a death-knell appeal. The death knell doctrine would thus be stood on its head in that the decision whether to pursue the individual claim will be governed by the availability of a death knell appeal, rather than *vice-versa*.

[26] The district court docket entries reproduced in the Appendix detail the activity in that court only through the filing of the Notice of Appeal on September 29, 1976. They reflect respondents' request for production of documents on September 22, but fail to show that respondents thereafter filed two sets of interrogatories and two additional requests for documents—all at a time when only their individual claim was pending.

its pursuit; therefore even if the death knell doctrine of *Eisen I* were applied, the decertification order could not be deemed "final" or appealable. *Bowe v. First of Denver Mortgage Investors*, 562 F.2d 640 (10th Cir. 1977).

This case also serves to demonstrate why, if some sort of death knell rationale is to receive the imprimatur of this Court, such a rule must, at a minimum, contain the safeguards built into the doctrine by the Ninth Circuit. That Court has modified the *Eisen I* concept by ruling that an order refusing class-action certification cannot be appealed as "final" unless the plaintiff affirmatively establishes that *no member* of the proposed class—whether a named plaintiff or otherwise—possesses an individually viable claim. In *Share v. Air Properties G. Inc.*, 538 F.2d 279, 283 (9th Cir.), *cert. denied*, 429 U.S. 923 (1976), the Ninth Circuit, after correctly holding that the death knell theory is not properly considered an off-shoot or a corollary of the collateral order doctrine, enunciated its sharply curtailed version of the death knell rule:

> "Therefore, we hold that, if after appropriate proceedings and findings with respect to whether any member of the purported class possesses a cause of action which is viable if brought individually, it appears such a member exists, an order of the trial court denying class certification does not constitute an appealable order."

The court in *Share* refused to subscribe to the view that the existence of *any* nonviable claim would sound the death knell and dismissed the individual plaintiff's appeal because it appeared that another individual had suffered a loss in excess of $17,000.

In its opinion in this case, the Eighth Circuit purported to apply the *Share* formula but seriously misapplied it. The appellate panel appeared to read *Share* as requiring that the individually viable claimants be "actively engaged" in the litigation

in order to defeat appealability (Cert. Pet., p. A-9 n.2). The Eighth Circuit's perception of *Share* was clearly incorrect, as evidenced by the subsequent Ninth Circuit opinion in *Hooley v. Red Carpet Corporation*, 549 F.2d 643 (9th Cir. 1977). In *Hooley*, the court refused to limit or revise its holding in *Share*, and in fact reaffirmed it. Emphasizing that the purpose of the death knell theory is not to reward the individual named plaintiff or his lawyer but to make sure that ultimate review of the class action question is not foreclosed by the certification ruling, the court stated, *l.c.* 645:

> "The death knell doctrine is not designed to facilitate immediate review of refusals to certify an action as a class action. It is to make certain that the refusal to certify does not deprive the members of the purported class of an opportunity for review in due course of the refusal on appeal. All opportunity for such review is destroyed if the refusal will have the practical effect of terminating all effort by anyone to assert the particular cause of action involved and to preserve for review on appeal the allegedly erroneous refusal to certify. To determine whether such destruction has occurred requires an examination not limited to named plaintiffs."[27]

Again, the wisdom of the restrictions imposed by the Ninth Circuit is reflected in the instant record. As has been mentioned, plaintiffs' original counsel identified at least four of his own clients having individual claims ranging from $18,000 to $500,000. Yet respondents, with their loss of $2650, have been selected as standard-bearers for the class. The Eighth Circuit, by mindlessly applying the original *Eisen I* death knell concept, by misapplying the *Share-Hooley* rule, and by ignoring the facts in the record, has rewarded respondents' counsel for his predecessor's maintenance of this action solely in the name of his client who had suffered the least from petitioners' alleged mischief.

[27] Of course, even the modified doctrine developed by the Ninth Circuit has been rendered expendable by the intervening decision in *United Airlines, Inc. v. McDonald*, as discussed above.

Whether the appealability question is examined under the original Second Circuit formula of *Eisen I* or under the modified view of the Ninth Circuit in *Share* and *Hooley*, the death knell simply has not rung. The Court of Appeals, therefore, should have dismissed the appeal.

II. The Court of Appeals Exceeded the Proper Scope of Its Authority in Reversing the District Court's Decertification Order.

If, despite the foregoing argument, this Court should adopt the death knell doctrine and approve the Eighth Circuit's utilization of it in this case, it will then be incumbent upon the Court to face the issue left unresolved last Term in *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977), where the Court said:

> ". . . we do not reach the question whether a Court of Appeals should ever certify a class in the first instance."

In *Rodriguez*, three Mexican-American truck drivers filed suit challenging their employer's "no transfer" policy which, when considered in conjunction with the seniority system existing in the collective bargaining agreements between the company and the unions, was said to constitute racial and ethnic discrimination. In spite of an allegation in their complaint that they were proceeding on behalf of a class, the plaintiffs did not move before trial to have the action certified, and the district court made no certification ruling. When the case ultimately went to trial, the court dismissed the class action allegations. After hearing the evidence, the court also rejected the plaintiffs'

individual claims, holding, *inter alia*, that they were not qualified for the jobs they sought and, therefore, that they had failed to make a *prima facie* case of discrimination.

On appeal by the individual plaintiffs, the Court of Appeals for the Fifth Circuit (a) reversed the class action determination, (b) certified a class and (c) imposed class-wide liability on the company and the union on the basis of the proof adduced at trial. The court discounted the individual plaintiffs' failure to move for certification before trial, reasoning that the responsibility for adjudicating the class question rested on the shoulders of the district judge, whether or not the named plaintiffs sought certification.

This Court, in a unanimous opinion, reversed the judgment of the Fifth Circuit and concluded that "the Court of Appeals plainly erred in declaring a class action and in imposing upon the petitioners classwide liability." *Id.* at 403. It ruled that the appellate court had paid insufficient heed to the plaintiffs' failure to request class certification and observed that "it was evident by the time the case reached that Court that the named plaintiffs were not proper class representatives under Fed. Rule Civ. Proc. 23(a)." *Ibid.* One of the "strong indications" that the plaintiffs did not adequately represent the class was their failure to move for class certification prior to trial. The Court of Appeals was chastised for its usurpation of the trial court's discretionary function and for its failure to recognize that even in cases involving class-wide racial or ethnic discrimination "careful attention to the requirements of Fed. Rule Civ. Proc. 23 remains nonetheless indispensable." *Id.* at 405.

The instant case is even more aggravated than *Rodriguez*. Here the Court of Appeals reversed the district court's order disestablishing the class action, and in effect entered a class certification order, without any analysis whatsoever of whether the requirements of Rule 23 had been met in the first place or

whether the revocation of class certification was sustainable on any other ground appearing in the record. The Eighth Circuit, on the basis of a cold record, simply substituted its judgment for that of the district judge who had been living with the case for more than three years.

The Court of Appeals disregarded the fact that petitioners' Motion to Decertify the class action had advanced a number of separate grounds in support of the requested decertification, including, *inter alia*: (1) inadequacy of respondents as class representatives; (2) delay in moving for class certification and in requesting a certification hearing; (3) lack of prosecution and delay in requesting discovery of names and addresses of class members after certification had been granted; and (4) manageability problems created by the predominance of individual questions over class questions, particularly as regards the issues of reliance, causation and the statute of limitations (Apdx. 201-04).

The district court upheld petitioners' contention that the protracted delay in seeking the identify of the class members was unjustifiable and evidenced a lack of diligent prosecution on the part of respondents as class representatives. The court thus had no occasion to address the other issues raised by the Motion to Decertify. The Court of Appeals, disagreeing with the lower court on the stated ground of lack of prosecution, merely recertified the class action without considering the other issues raised by petitioners in their Motion, thereby contravening the well-accepted principle that an order of a lower court should be affirmed on appeal if it is sustainable on any ground appearing in the record. *United States v. New York Telephone Co.*, — U.S. —, 46 U.S.L.W. 4033, 4035 n. 8 (1977); *Helvering v. Gowran*, 302 U.S. 238 (1937); *Carpenters' District Council v. Brady Corp.*, 513 F.2d 1 (10th Cir. 1975); *Sapp v. Renfroe*, 511 F.2d 172 (5th Cir. 1975).

We submit that the Court of Appeals exceeded its authority in (a) substituting its judgment for the district court on the

question of lack of prosecution, (b) recertifying the class without considering the numerous other factors bearing on the suitability of respondents as class representatives, and (c) recertifying the class without analyzing whether the remaining requirements of Rule 23 were met or whether the case had been properly certified for class action treatment in the first instance.

A. The Court of Appeals Exceeded Its Authority in Reversing the Decertification Order on the Stated Ground of Lack of Prosecution by Respondents.

The machinery of Rule 23 has been entrusted to the sound discretion of the district judge who, after all, is the person who must live with this sometimes unwieldy and hydra-headed monster known as the class action. The initial determination of whether a case should proceed on a class basis is discretionary with the district court and must take account of a number of factors. *In re Cessna Aircraft Distributorship Antitrust Litigation*, 518 F.2d 213 (8th Cir.), *cert. denied*, 423 U.S. 947 (1975); *Fendler v. Westgate-California Corp.*, 527 F.2d 1168 (9th Cir. 1975). That important decision is often facilitated immeasurably by an in-person observation of conditions and participants; it is generally unsuited to adjudication on the basis of an abstract, impersonal record. In *City of New York v. International Pipe and Ceramics Corp.*, 410 F.2d 295, 298 (2d Cir. 1969), the court, emphasizing the problems associated with a class certification ruling, said:

> "This issue should not be decided in an abstract or academic manner but rather in a practical and realistic way by a trial judge who has knowledge of the actual problems presented in the courtroom by these multi-plaintiff, multi-defendant cases."

An appellate court may overturn a class action ruling only upon a showing that the trial court abused its discretion. *Wright*

v. Stone Container Corp., 524 F.2d 1058 (8th Cir. 1975); *Boggs v. Alto Trailer Sales, Inc.*, 511 F.2d 114 (5th Cir. 1975); *Rutledge v. Electric Hose and Rubber Co.*, 511 F.2d 668 (9th Cir. 1975). Here, by contrast, the appellate court simply substituted its judgment for that of the trial judge and, in so doing, disrupted the balance built into Rule 23 by its authors and restored by this Court in *Rodriguez*.

The district court's finding of respondents' failure to diligently prosecute this action was made against the background of the following chronology:

Date	Event
July 27, 1973	Complaint filed (Apdx. 1).
April 11, 1974	Respondents first moved for class certification (Apdx. 5, 85).
November 18, 1974	Respondents first requested evidentiary hearing on class certification (Apdx. 108).
June 19, 1975	District court ordered that case may proceed as class action (Apdx. 11, 169).
October 23, 1975	District court directed respondents to conduct discovery to ascertain names of members of class (Apdx. 13, 186).
April 20, 1976	Respondents sought list of Punta Gorda securities purchasers by telephone communication with counsel for Petitioner Punta Gorda Isles, Inc. (Apdx. 215).
April 21, 1976	Respondents were advised that requested list was not available

and that it was inappropriate in any event (Apdx. 215).

July 20, 1976 — Respondents first filed a request for production of documents seeking names and addresses of prospective class members (Apdx. 14, 200).

The record before the district court thus reflected that respondents had originally delayed for nine months in seeking a class action determination, a factor specifically recognized by this Court in *Rodriguez* as bearing heavily upon their suitability as class standard-bearers. Although the district court apparently did not consider this original delay as *per se* disqualifying to respondents, their subsequent unexcused dilatoriness in failing for nine additional months after the lift of the stay on discovery to seek elementary and critical information as to the identity of the class members was more than the trial judge could tolerate. Although it may be true, as noted by the Court of Appeals, that not all of the three-year delay between the filing of the complaint and the requested discovery of the names of class members was attributable to respondents, it is simply untenable to assert that the district judge abused his discretion in finding "that there has been a lack of prosecution on the part of the plaintiffs as class representatives." The district court's action in decertifying the class was long overdue and remarkably restrained, and the Court of Appeals overstepped the bounds of judicial scrutiny in second-guessing the judgment of the trial judge.[28]

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[28] In *Link v. Wabash Railroad Co.*, 370 U.S. 626 (1962), the Court reaffirmed the discretion of the trial judge to purge his docket of cases which are not diligently pursued. If such a rule pertains where the result is a dismissal of the plaintiff's claim with prejudice, the instant case is *a fortiori* because respondents' individual claim was untouched by the challenged order.

B. The District Court's Decertification Order Was Also Sustainable on the Ground That Respondents Were Not Adequate Representatives of the Class for a Number of Other Reasons Appearing in the Record.

In order to ensure compliance with the mandatory requirements of Rule 23(a)(4), the court in every class action must "undertake a stringent and continuing examination of the adequacy of representation by the named class representatives at all stages of the litigation . . ." *Susman v. Lincoln American Corp.*, 561 F.2d 86, 89 (7th Cir. 1977); *National Association of Regional Medical Programs, Inc. v. Mathews*, 551 F.2d 340 (D.C. Cir. 1976), *cert. denied*, — U.S. —, 53 L.Ed. 2d 270 (1977); *Rutledge v. Electric Hose and Rubber Co., supra.* In *Eisen II*, 391 F.2d 555, 562 (2d Cir. 1968), the court stressed the importance of the credentials of the named plaintiffs:

> "Traditionally, courts have expressed particular concern for the adequacy of representation in a class suit because the judgment conclusively determines the rights of absent class members. See *Hansberry v. Lee*, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940). Of course, understandably, the standards for representation under the old spurious class action were not as rigorously enforced, due to the minimal *res judicata* effects given to the judgments in these suits. *See Oppenheimer v. F. J. Young & Co.*, 144 F.2d 387 (2d Cir. 1944). However, as a result of the sweeping changes in Rule 23, *a court must now carefully scrutinize the adequacy of representation in all class actions.*" (Emphasis supplied.)

One of the principal criteria for measuring the suitability of the would-be class champion is the vigor with which he asserts and prosecutes the claims of the class. *Senter v. General Motors Corporation*, 532 F.2d 511 (6th Cir. 1976); *Fendler v. Westgate-California Corp., supra; Gonzales v. Cassidy*, 474 F.2d 67

(5th Cir. 1973). As pointed out above, delay in moving for class certification, or in otherwise protecting the interests of the class, bears directly upon the adequacy evaluation. *East Texas Motor Freight System, Inc. v. Rodriguez, supra.* But in the instant case, that delinquency hardly stands alone. To the contrary, respondents' leadership was tainted from the outset by a conflict of interest of their original attorney from which they never recovered. When the suit was filed, it seemed strange that the underwriters, who had managed the Punta Gorda public securities offering, were conspicuously missing from the lineup of defendants. Information soon surfaced that respondents' attorney also represented one of those underwriters and naturally provoked a question of possible divided loyalties. In order to thwart an airing of this issue, respondents stalled the evidentiary hearing on the class action certification. Rather than trying to dispel the doubts raised about the conflict of interest, respondents sought further to entrench themselves as class representatives by seeking discovery on the merits before the class-action question was adjudicated (Apdx. 96). That request was denied, and the district court ordered that the issue of respondents' adequacy, among others, should be fully explored in an evidentiary hearing (Apdx. 10, 108).

The hearing, held on December 30, 1974, betrayed respondents' intensive efforts to block exploration of the conflict-of-interest problem. The evidence revealed that no meaningful investigation or good-faith determination had been made by respondents' counsel as to the necessity, desirability or wisdom of joining the underwriters, and the only feasible explanation for this infirmity was counsel's conflict of interest (Apdx. 153-60). Respondents contended that a thorough investigation of the case had preceded the filing of their complaint, but the evidence showed that the entirety of that effort had consisted of counsel's casual discussions with two officers of the potential underwriter-defendants (Apdx. 156-60). Even the predictably self-serving comments by those officials about their own diligence, however,

suggested that the underwriters should be named as defendants in any lawsuit which might be filed (Apdx. 157-59); and neither respondents nor their attorneys were able to offer any cogent explanation for not joining the underwriters (Apdx. 71, 160, 182-83).[29]

Although respondents and their counsel stoutly denied any conflict of interest, there was little doubt that respondents' decision not to sue the underwriters was prompted not by an impartial assessment of the merits of the claim but by their attorney's loyalty to one of those underwriters. Accordingly, it was no surprise when the district court issued an order declaring that counsel's conflict of interest and apparent violations of Disciplinary Rule 5-105(A) and Ethical Considerations 5-14 and 5-15 of the Code of Professional Responsibility cast a shadow on the adequacy of respondents' representation of the class (Apdx. 170). While the court certified the case as appropriate for class action treatment, it ordered respondents' original counsel to show cause why he should not be enjoined from representing the class. *Cf. Susman v. Lincoln American Corp., supra.* Rather than challenging the court's findings or attempting to explain his conduct, counsel simply withdrew from the action (Apdx. 173-74).

Upon the appearance of respondents' new counsel on June 30, 1975, the district court promptly inquired what action they proposed to take regarding the underwriters (Apdx. 179). Apparently because respondents had concluded that the statute of limitations had expired on claims against the underwriters while their first counsel maneuvering to suppress his conflict-

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[29] We do not suggest that the underwriters should be defendants in this lawsuit or that there is any merit to a claim against the underwriters or, for that matter, against any of the petitioners. Rather, we believe that all of respondents' claims are spurious and will not survive the scrutiny of a trial on the merits. The fact remains, though, that there is absolutely no basis, other than the conflict of interest, to justify or explain respondents' variation in treatment between the underwriters and all other participants in the Punta Gorda offering.

of-interest problem, they made no response to the district court's inquiry.[30] Instead of acknowledging that their inaction had extinguished a potential claim of the class, they merely stated that no additional defendants would be named "at the present time," thereby conveying the misleading impression that a suit against the underwriters was still under consideration and a real possibility (Apdx. 183).

When the district court ultimately realized that respondents had not been completely candid and that the statute of limitations might have expired during their attorney's concerted effort to hide his divided loyalties, it expressed serious reservations about their willingness and ability to protect the interests of the class. On October 23, 1975, the court issued a directive to respondents either to join the underwriters or to proffer some valid reason for not doing so. In the course of that order, the district judge manifested his distress over the seeming inadequacy of respondents' leadership:

> "The Court is presently concerned with plaintiffs' adequacy as representative of the class. . . . The presence of new counsel does not in itself erase the shadow of inadequate representation previously cast. . . . Even if the two absent underwriters are joined, the question of plaintiffs' adequacy as representatives of the class remains. Plaintiffs have shown a lack of complete willingness to protect the interests of *all* the members of the class throughout the course of this action. . . . To decertify this as a class action at this time based on the inadequacy of representation, however, may jeopardize potentially valid claims held by absent class members. Notice, therefore, should be sent out to the class pursuant to F.R.C.P. 23(c)(2). In this manner, the members of the class will be on notice as to the disposition of the present action and will have the opportunity to choose for themselves if they wish to be bound by the judgment that will ensue. The notice will specify first that members may exclude themselves from the class upon request, F.R.C.P. 23(c)(2)(A); that if the class member does not opt out then he will be bound by the judgment entered, F.R.C.P. 23(c)(2)(B); that if the class member does not exclude himself he may enter an appearance through counsel, F.R.C.P. 23(c)(2)(C); *and that the court requests petitions for appointment of new class representative or in the alternative, intervention by class members,* F.R.C.P. 23(d)(2). To explain the Court's request for petitions or intervention, sufficient facts of the case will be given in the notice" (Apdx. 187-88; emphasis added).

[30] In an affidavit filed with the district court on August 16, 1976 (Apdx. 15), respondents' current counsel stated that upon review of the applicable law they "had determined that any claims against underwriters had been barred by the statute of limitations prior to the date upon which present counsel entered their appearance . . ."

This language left little room for speculation as to the course the court intended to pursue. Respondents were aware that this order, if implemented, would inevitably eliminate them as class representatives. If the full story of respondents' mismanagement of the lawsuit were disclosed to the other class members, respondents would be quickly dethroned as class champions. Therefore, instead of abiding by the court's October 23rd order, respondents sought to solidify their position by seeking discovery on the merits while opposing and delaying implementation of the order. They submitted a form of proposed notice which omitted any reference to the appointment of a new class representative, and they attempted to formulate a notice which would not have created any uproar about their behavior (Apdx. 212-14). They also tried to nullify the anticipated effect of distribution of the notice on their control over the lawsuit by proposing that class members should be prohibited from communicating with the district court. Specifically, they asked the court to instruct class members to send "communications commenting upon the conduct of this action"

to their attorneys and not to the district court (Apdx. 199, 214). This was nothing but a transparent attempt to impede the district court's appraisal of the need or desire for a new class representative.

At the same time, while striving to delay and dilute the notification to the class, respondents ignored that portion of the October 23rd order requiring that "discovery shall proceed as to finding the names and addresses of the class members" (Apdx. 189). In spite of this clear directive, respondents did not initiate even informal attempts to obtain this essential data until April 1976 and did not institute discovery procedures under the Federal Rules until July 20, 1976, some nine months after the entry of the order. They offered no excuse for this intolerable procrastination other than to say that they generally preferred to postpone their discovery until after the form of class notice had been settled. The real, albeit unspoken, reason for the delay was respondents' reluctance to hasten the sending of a form of notice which would likely undermine their position as leaders of the class and produce a new and more diligent class representative with, of course, his own counsel.

Considered in its overall context, the district court's decertification ruling, though specifically couched in terms of failure to prosecute, also reflected the court's repeatedly voiced disenchantment with respondents' representation of the class.[31] Respondents got off on the wrong foot because of their original counsel's conflict of interest and their subsequent attempts to conceal the consequences of that conflict. The tardiness in seeking names of the class members, when piled on top of the original delinquency in requesting class certification, displayed

[31] The Court of Appeals seemed to recognize that the failure to prosecute did not exist in a vacuum but was merely a facet of the trial court's concern about respondents' adequacy (Cert. Pet., p. A-11 n. 6). Nonetheless, the appellate court unaccountably refused to consider the other factors bearing on the adequacy question.

an insensitivity and infidelity to the high standards demanded of class leaders. The district court exhibited commendable patience and tolerance with respondents but finally, exasperated by their behavior and convinced of their inability to lead the class, decertified the class on September 1, 1976. That judgment is sustainable for the expressed reason of lack of prosecution, as well as for the implicit and interrelated reason of respondents' overall inadequacy as class representatives.

C. The Court of Appeals Erred in Recertifying the Class Without Determining Whether It Was Properly Certified in the First Place.

The judgment of the Court of Appeals illustrates yet another of the fundamental flaws in the death knell theory. When the district court originally ruled that the case should be maintained as a class action, petitioners believed that order to be erroneous for a number of reasons but were foreclosed from seeking immediate review of that decision by the final judgment rule. But upon decertification of the class, the Court of Appeals entertained respondents' appeal and reinstated the class action without any analysis of the propriety of the district court's initial class action determination. Hence, the one-sidedness of the death knell doctrine has permitted respondents to obtain review of an order adverse to them while denying petitioners any appellate consideration of the propriety of the original class action designation.

One of the principal defects in the district court's initial class action determination stemmed from the inadequacy of respondents' representation of the class. It was clear error for the Court of Appeals to recertify the class without analyzing that issue. In addition, the class should never have been certified because the individual questions—particularly those involving reliance, causation and the statute of limitations—predominated over the

class questions. For example, claims under §§ 11 and 12 of the 1933 Act must be commenced within one year of discovery, and since this action was not instituted until 15 months after the Punta Gorda offering, each member of the class would be required to prove his own individual compliance with the limitations requirement. Moreover, subsequent developments in this Court and in the Eighth Circuit have eroded much of the rationale underlying the class certification and cast serious doubt upon the validity of the district court's original conclusion. See ***Blue Chip Stamps, Inc. v. Manor Drug Stores,*** 421 U.S. 723 (1975); ***Ernst & Ernst v. Hochfelder,*** 425 U.S. 185 (1976); ***Harris v. American Investment Company,*** 523 F. 2d 220 (8th Cir. 1975), ***cert. denied,*** 423 U.S. 1054 (1976).

Another essential and inextricably intertwined component of a class action which is wanting in this case is manageability, as required in Rule 23(b)3(D). The Court of Appeals sent the case back to the district judge without even pausing to consider whether it could be feasibly handled on a class action basis. The necessity of individualized investigation of the reliance, causation and limitations questions could very well turn the trial of this case into a trial by ordeal.[32]

The Eighth Circuit ignored the admonition of this Court in *Cohen v. Beneficial Industrial Loan Corporation, supra,* 337 U.S. at 546, that "appeal gives the upper court the power of review, not one of intervention." The Eighth Circuit has indeed "intervened" and has effectively certified a class action in the first instance without any consideration of the stringent requirements of Rule 23. The Court of Appeals has severely, unnecessarily and unwisely interrupted an on-going lawsuit. Such interlocutory intervention is ordinarily abhorrent enough, but when the stakes are as high as those set by Rule 23, the

[32] In fact, the district court had announced its intention to reconsider its earlier ruling that individual issues of fact did not predominate (Apdx. 189).

courts must be especially faithful to the strictures of that Rule because of the potential for abuse lurking in class actions, particularly in securities cases. *See Blue Chip Stamps, Inc. v. Manor Drug Stores, supra.* The superficial approach of the Eighth Circuit here is a vivid testimonial to the soundness of the final judgment rule and to the undesirability of piecemeal review of class action questions. The judgment of the Court of Appeals is at odds with the mandate of *Rodriguez* that "careful attention to the requirements of Fed. Rule Civ. Proc. 23 remains nonetheless indispensable." The district court's decertification order was not appealable, but even assuming otherwise, the Eighth Circuit has far exceeded the proper scope of its authority.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

VERYL L. RIDDLE

THOMAS C. WALSH

JOHN J. HENNELLY, JR.

MICHAEL G. BIGGERS
BRYAN, CAVE, McPHEETERS
& McROBERTS
500 North Broadway
St. Louis, Missouri 63102
Attorneys for Petitioner
Coopers & Lybrand

HARRIS J. AMHOWITZ
Of Counsel

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ADDENDUM

ADDENDUM

TITLE 28, UNITED STATES CODE

§ 1291. Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

§ 1292. Interlocutory decisions

* * * *

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is

superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to Be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b) (3), whether

or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.